United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1472

To be argued by
EVERETT E. LEWIS

B
P/S

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 74-1472

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,

Plaintiff-Appellee,

and

ANGEL ROMAN,

Intervenor-Respondent,

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, AMALGAMATED MACHINE, INSTRUMENT AND METAL LOCAL 485,

Defendant-Appellant

APPELLANT'S BRIEF

Vladeck, Elias, Vladeck & Lewis,
Attorneys for Appellant
1501 Broadway
New York, N.Y. 10036.

239-4200

INDEX TO BRIEF

Table of Cases

Table of Statutes

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

----------x

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,

Plaintiff-Appellee,

and

ANGEL ROMAN, No. 74-1472

Intervenor-Respondent,

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO
AND MACHINE WORKERS, AFL-CIO, AMALGAMATED
MACHINE, INSTRUMENT AND METAL LOCAL 485,

Defendant-Appellant

----------x

APPELLANT'S BRIEF

STATEMENT

This appeal is from the judgment and order of the United States District Court for the Eastern District of New York (Dooling, J.) entered March 13, 1974, declaring void and invalid the election conducted by the Defendant-Appellant on February 24, 1970, for the office of Business Manager, and directing that a new election for this office

be held under Labor Department supervision in September 1974 at the time of the appellant union's next regular membership meeting. The defendant union also appeals from a subsequent order dated and entered April 5, 1974, requiring inter alia that Hamilton Archer resign from the office of Business Manager at least thirty (30) days prior to the supervised election.

Jurisdiction of this action was conferred by Section 402(b) of the Labor Management Reporting and Disclosure Act of 1959 (29 USC 401 et seq.) herein referred to as the Act, and the appeal is brought under Section 402 (d) of the Act (29 USC 482(d)).

QUESTIONS PRESENTED

1. Did the District Court err in declaring the February 24, 1970 election of Hamilton Archer to the office of Business Manager of Local 485 to be void?

The appellant contends that the Court below in invalidating this election has in effect sanctioned an untimely challenge to Hamilton Archer's previous appointment as acting Business Manager in September 1969 by

holding that the alleged unconstitutionality of this appointment tainted the subsequent election.

2. Did the District Court err in ordering that Hamilton Archer resign as Business Manager thirty (30) days prior to the supervised rerun of the election for the office of Local 485 Business Manager?

The appellant contends that not only is the imposition of this condition without statutory sanction, but it is moreover both unprecedented and peculiarly inappropriate.

STATEMENT OF FACTS

The material facts in this case, none of which were ever seriously controverted, are succinctly set forth in the Findings of Fact of the District Court. Those findings may fairly be summarized as follows:

Applicable Provisions of the Local 485 Constitution

Article XI of the Local 485 constitution (F-9 and F-10)* governs the election of Local officers and in

---

*Citations to the Findings of Fact will be in the form (F -).

pertinent part provides:

"Section 1. Nominations for officers of the Local (namely, President, ... Business Manager ...) ... shall be made from the floor at a nominations meeting of the Local in December of each alternate year beginning with December of 1963....

"Section 7. ... A Local Organizer or Business Agent shall not be eligible for election to any office in the Local while he is an Organizer or Business Agent.

* * *

"Section 10. ... In the event a vacancy occurs in any office or elected position, the vacancy for the unexpired term shall be filled by nomination and election at the next regular meeting of the Local. Nominations and elections to fill vacancies shall be conducted in accordance with the procedures of this Article insofar as applicable."

However, the Court below went on to find that "literally there is no provision for an office left vacant at a

preceding regularly scheduled and conducted election of officers." (F-11)

The Vacancy in the Office of Business Manager and the Appointment of Hamilton Archer

The office of Business Manager had been deliberately left unfilled since 1967 when in September 1969 the Local president decided that the vacancy should be filled. (F-35) Although the Local Constitution is silent on filling an office deliberately left vacant (F-11), Messrs. Cameron and Eisenberg, the previous Business Managers, had both been appointed by the officers and approved by the executive board before subsequently being elected by the membership. (F-19)

Hamilton Archer had an avowed interest in becoming Business Manager (F-26) and the Local officers, concerned as they were with racial tensions and related ethnic considerations (F-37), recognized him as a person having the required technical negotiating and managerial qualifications. (F-36) Accordingly, Archer was unanimously appointed to the office of Business Manager by the Local officers on September 26, 1969 on the recommendation of President Fay (F-24) and Archer was so notified. (F-13)

Thereafter, on October 18, 1969, the 75 member Local executive board ratified Archer's appointment. (F-32)

No challenge to Archer's appointment as Business Manager was filed with the Union nor was any timely complaint filed with the Secretary of Labor challenging this appointment as violative of the Local Constitution or of the Labor-Management Reporting and Disclosure Act. (F-34)

Hamilton Archer's Previous Experience as Business Agent

Hamilton Archer was first employed by the Union as a Business Agent in 1966 (F-20), and continued in that capacity up to the time of his appointment to the office of Business Manager on September 26, 1969. (F-25) As Business Agent, Archer spent 90% of his time servicing the shops assigned to him, devoting the remainder to organizing and other matters. (F-22) He did not resign from the position of Business Agent prior to his appointment as Business Manager (F-39) nor prior to his nomination on December 18, 1969, for the office of Business Manager (F-40), nor, indeed, subsequent to his election as Business Manager on February 24, 1970. (F-41)

Notice and Publicity Attendant Upon Hamilton Archer's Appointment as Business Manager

By a letter dated September 29, President Fay notified all Local shop chairmen and shop committee members of Hamilton Archer's appointment as Business Manager (F-12) and requested that the letter be posted in the various shops in accordance with the normal practice for notifying the members of important Local matters. (F-31) Copies of this letter were in fact posted in many shops including those serviced by Archer (F-14).

Thereafter, and some time prior to the October 18th, 1969 executive board meeting, Hamilton Archer's appointment to the office of Business Manager was announced in the official Local 485 Newsletter. (F-30)

While the 75 member executive board of the Local duly ratified Archer's appointment at the regular meeting held on October 18, 1969 (F-32), the 6,000 members of the Local were neither informed that Archer was to be appointed prior to the September 26, 1969 officers meeting (F-28 and F-29) nor were they informed that the ratification of this appointment would be acted upon at the October 18, 1969, executive board meeting. (F-33). On November 14, 1969,

a testimonial dinner for Archer with wide Local participation was attended by more than 500 of his supporters. (F-56)

Hamilton Archer's Activities as Business Manager

The Local Business Manager must spend 70 to 80% of his time overseeing the work of the Local and developing new programs and, accordingly, following his appointment as Business Manager, Hamilton Archer devoted only a minor fraction of his time to servicing shops. (F-23) Shortly following his appointment, Archer moved out of the staff room occupied by Business Agents and thereafter shared office space with President Fay as had his predecessors Cameron and Eisenberg. (F-55) However, he declined to accept the Business Manager's salary. (F-54) As Business Manager, Archer exercised such functions as hiring an assistant to run the Gretsch strike (F-42), and reassigning Business Agents Roman and Hernandez exclusively to organizational work. (F-49) Archer also served as delegate ex-officio to special International and District conventions on the big GE strike thereafter mobilizing strike support within the Local. (F-57) As had his predecessors, Archer as Business Manager continued to service at least 9 shops

in the same manner that he had serviced those shops prior to his appointment to the office of Business Manager. (F-47 and F-48) No new Business Agent was hired to replace Archer (F-51) and there was no systematic reassignment of the shops that Archer had serviced prior to his appointment. (F-44 and F-45) Ascertaining which of Mr. Archer's shops had in fact been reassigned was complicated by the unique situation that had prevailed at the Fedder's shop extending well into 1969. (F-46) The resolution of the Fedder's situation by chartering the Fedder's shop as a separate Local reduced the scale of the Local's servicing activities and resulted in a shift toward organizing new shops and recruiting new members. (F-52)

The December 1969 Nominations and the February 1970 Election

Hamilton Archer was the sole nominee for the office of Business Manager at the December 18, 1969 Local membership meeting. (F-15) The nomination of Intervenor Angel Roman for the office of Recording and Corresponding Secretary was disallowed by President Fay on the grounds that Mr. Roman was then still a Business Agent. (F-16) While the local officers were interested in arriving at a

balanced ticket or candidates for the 1970 elections, it was the membership at the December nominating meeting that actually made that determination. (F-38) Hamilton Archer ran unopposed for Business Manager in the Local elections held on February 24, 1970, and he was duly elected. (F-18) Thereafter, on February 26, 1970, Intervenor Roman and 8 other members protested the conduct of the February 24, 1970, election of Local officers to the Local's executive board. Having exhausted their remedies within the Local, a complaint was timely filed with the Secretary of Labor on June 15, 1970. (F-7)

APPLICABLE STATUTORY PROVISION
AND LABOR DEPARTMENT REGULATIONS

Section 402(29 U.S.C. 482) in pertinent part provides:

> "Sec.402. (a) A Member of a labor organization-
> (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or
> (2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,
> may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid impending a final decision thereon (as hereinafter

provided) and in the interim the affairs of the organization shall be conducted by the officers elected ....

(c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds-

(1) that an election has not been held within the time prescribed by section 401, or

(2) that the violation of section 401 may have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. ..."(underscoring supplied)

The regulations promulgated by the Secretary under the Act, insofar as they are here applicable, state:

"§452.25 Vacancies in office.

Title IV governs the regular periodic elections of officers in labor organizations subject to the Act. No requirements are imposed with respect to the filling by election or other method of any particular office which may become vacant between such regular elections. If,for example, a vacancy in office occurs in a local labor organization, it may be filled by appointment, by automatic succession, or by a special election which need not conform to the provisions of Title IV."

"§452.2 Application of union constitution and bylaws

Elections required to be held as provided in the title are to be conducted in accordance with the validly adopted constitution and bylaws

of the labor organizations insofar as they are not inconsistent with the provisions of the Act.

"§452.3 Interpretations of constitution and bylaws.

The interpretation consistently placed on a union's constitution by the responsible union official or governing body will be accepted unless the interpretation is clearly unreasonable."

POINT I

THE COURT BELOW ERRED IN VOIDING HAMILTON ARCHER'S ELECTION AS BUSINESS MANAGER

The Court below rejected Hamilton Archer's "de facto" incumbency by virtue of his constitutionally invalid appointment as Business Manager, holding that Hamilton Archer "had to stand on the title ... that was rightfully his" (Findings of Fact and Order for Judgment, page 19) i.e. that of Business Agent. But since there was no timely challenge to Archer's appointment as Business Manager (F-34), his status as appointee was not subject to collateral attack under the umbrella of a timely complaint concerning his subsequent election. Indeed, followed to its logical conclusion, the rationale of this decision would open up all union elections by sanctioning openended searches

for alleged prior violations the taint of which still pervades. Needless to say, the statutory scheme of the Act guards against such intrusion into union affairs by imposing strict time limits on election complaints.

Congress intentionally created a narrow remedy in Title IV of the Act so that interference with union elections would be kept to a minimum. Thus it is a settled matter that the Secretary may not challenge a union's election unless a union member has first filed a timely complaint about it. Calhoon v. Harvey, 379 US 134, 140 (1964).

The purport of the legislative history of Title IV is clear. Congress recognized that the public interest in union democracy, as they viewed it, would be secured most satisfactorily by insuring that union members who were dissatisfied with some aspect of their organization's election procedures, and who were unable to obtain internal relief, would receive government assistance in pressing their case in court. As a corollary, the legislators believed that in the absence of any expression of membership dissatisfaction to the union itself, the union's members should be free, without government

direction, to set their own rules and regulations, and to decide which officers they wish to retain and which officers they wish to unseat by protesting their elections. See e.g. Hodgson v. Local 6799 United Steel Workers, 403 U.S. 333, 340 (1971) where the Court limited the Secretary's power to initiate actions to violations alleged in the members' complaint to the union in order to avoid subversion of the exhaustion requirement.

The position we argue for is strengthened further when the import of Section 601 of the Act is taken into account. For Section 601 has been construed to afford the Secretary broad visitatorial powers, see e.g. Wirtz v. Local 191, Teamsters, 321 F.2d 455 (C.A.2 1964). But those visitatorial powers are not accompanied by a grant of coercive powers. Thus, Congress was not of the view that the Secretary should have the right to go into court whenever he uncovers conduct he believes to be illegal. Instances where the Secretary believes that there is an uncorrected wrong, but cannot secure court relief, are a natural product of the overall balance between union autonomy and government power that Congress struck in this area. The rhetoric of "public interest" cannot be employed to

mean that public rights outweigh the union's right to self-government. Nor can it be invoked to create the impression that they are diametrically opposed to one another. For when attention is focused on the union's right to maintain its autonomy and the public's right to impose minimum standards of conduct on the union, it is clear that they are in apposition to one another. Cf. Int'l Union, Local 283 v. Scofield, 382 U.S. 205, 217-221 (1965).

To sum it up, whatever the constitutional validity of Hamilton Archer's appointment as Business Manager, the fact that no member filed a timely challenge to that appointment precluded a collateral attack upon the appointment by the Secretary. In any event, Archer's de facto incumbency as Business Manager, even if pursuant to unconstitutional appointment, effectively removed him from the position of Business Agent. It is a blatant non sequitur to conclude that because of his allegedly defective appointment as Business Manager Archer somehow remained a Business Agent. Surely no presumption of continuity attaches in this situation. Accordingly, Archer's appointment as Business Manager and his assumption of the responsibility of that office relieved him

of the Business Agent's disqualification for running for local office (Constitution,Article XI, Section 7 supra)

POINT II

THE DISTRICT COURT ERRED IN ORDERING THAT HAMILTON ARCHER RESIGN AS BUSINESS MANAGER PRIOR TO THE SUPERVISED RERUN ELECTION

Under Section 402A(2) of the Act, Hamilton Archer's right to remain in office until his successor has been chosen by the membership in the supervised rerun election would seem beyond cavil. Thus Section 402 stipulates that the elected officers chall continue the affairs of the union until there is a "final decision" on the election challenge. Section 402(c) appears to indicate that the "final decision" on the challenge election occurs when the Court enters a decree declaring the persons certified by the Secretary to be the officers of the union.

In this regard it is also deemed significant that under Section 401(h) even elected officers guilty of serious misconduct cannot be removed by the Secretary until the membership sanctions such removal by a secret ballot election. Moreover, the detailed specification

of remedies in Sections 402(b) and (c) of the Act, especially when contrasted with the more flexible provisions of Sections 102, 210 and 304 indicates Congress' intention to preclude other forms of relief. It should be noted that the latter sections of the Act generally authorize such relief including injunctions as may be "appropriate".

There are also items in the legislative history which arguably suggest that only limited relief is available in Title IV election cases. For example, other bills introduced during the pendency of this legislation expressly called for broader relief. See §748, 86th Cong., 1st Sess. §§302(d) and 405 (1959); H.R. 8342, 86th Cong. Sess. §402 (a) (1959). In addition, Senator Goldwater complained of the limited relief available in the formulation ultimately adopted. See e.g. 105 Cong. Res. 7632 (1959).

Finally, it is deemed significant that in none of the reported Title IV cases, many of which have involved egregious coercion, misuse of union periodicals and misappropriation of union funds for election purposes, has an officer been required to step down prior to the conduct of a new election under Labor Department supervision. In this

case, Hamilton Archer was unopposed and the election was conducted without taint.

POINT III

THE SECRETARY'S COLLATERAL ATTACK ON HAMILTON ARCHER'S APPOINTMENT AS BUSINESS MANAGER IGNORES APPLICABLE LABOR DEPARTMENT ELECTION REGULATIONS.

Assuming arguendo that this Court chooses to overlook the Secretary's belated collateral attack on Hamilton Archer's appointment as Business Manager, it would then be confronted with the applicable Labor Department election Regulations which, standing alone, present a well nigh insuperable hurdle.

The Court below found that there was no express provision in the Local 485 Constitution for filling an office left vacant at a preceding regularly scheduled and conducted election. (F-11) Section 452.25. of the Labor Department Regulations stipulates that no Title IV requirements are imposed with respect to the filing by election or other method of any particular office which may become vacant between the regular elections. This

section goes on to state that such vacancies "may be filled by appointment".

Section 452.3 of the Regulations provides the interpretation consistently placed on a union's constitution by the responsible union official or governing body "will be accepted unless the interpretation is clearly unreasonable". Since the election provisions of the Constitution are silent on filling this type of vacancy, the union's consistent practice of filling Business Manager vacancies by appointment should have been accepted by the Secretary. Plainly, a constitutional provision expressly directing that such vacancies be filled by appointment would be in accord with Section 452.25 of the Regulations.

CONCLUSION

For all of the reasons and authorities hereinabove set forth, the judgment and orders appealed from should be in all respects reversed and the complaint dismissed.

Respectfully submitted,

VLADECK, ELIAS, VLADECK & LEWIS
Attorneys for Appellant
1501 Broadway
New York, New York 10036

Dated: New York, N.Y.
May 1, 1974.

VLADECK, ELIAS, VLADECK & LEWIS
COUNSELLORS AT LAW
1501 BROADWAY · NEW YORK, N.Y. 10036

STEPHEN C. VLADECK
SYLVAN H. ELIAS
JUDITH P. VLADECK
EVERETT E. LEWIS
SHELDON ENGELHARD

THOMAS T. KILHENNY
DEBORAH A. WATARZ

AREA CODE 212
239-4200

IRA S. ROBBINS
COUNSEL

May 1, 1974

74-1472

Hon. A. Daniel Fusaro, Esq.
Clerk
U.S. Court of Appeals
U.S. Courthouse
Foley Square
New York, New York 10007

Re: Hodgson v. International Union
Docket No. 74-172

Dear Sir:

Enclosed herewith are the original and three copies of the appellant's brief. This is to certify that copies of this brief have this day been served by mail upon Harold Friedman, Esq., the Assistant U.S. Attorney handling this appeal, and upon the Intervenor, Angel Roman.

Very truly yours,

Everett E. Lewis

EEL:mc

cc: Harold Friedman, Esq.
Mr. Angel Roman
Mr. Hamilton Archer